

REGULATION OF HYDROPOWER IN MAINE

A Guide to the Maine Rivers Policy and Maine Waterway Development and Conservation Act



INCLUDES:

Title 12 M.R.S.A. Sections 401-407

Title 38 M.R.S.A. Sections 630-640

Administrative Regulations for Hydropower Projects

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**DEPARTMENT OF ENVIRONMENTAL PROTECTION
AND
LAND USE REGULATION COMMISSION**

**A Guide to the Maine Rivers Policy and Maine Waterway
Development and Conservation Act
June 2009**

I. Introduction

Under Maine law, hydropower development is regulated by the Maine Rivers Policy (12 M.R.S.A. Sections 401-406) and the Maine Waterway Development and Conservation Act (38 M.R.S.A. Sections 630-640). Both of these laws were enacted by Public Law 1983, Chapter 458, the so-called "Rivers Bill".

The Maine Rivers Policy protects outstanding segments of rivers and streams in the State from the construction of new dams, and provides for more stringent review of the additional development of dams existing on these segments. The Maine Waterway Development and Conservation Act (MWDCA) requires a single application and permit for the construction of all hydropower projects, structural alteration of some projects, and certain maintenance and repair projects.

Under federal law, hydropower development is regulated by the Federal Power Act and the Clean Water Act. The Federal Power Act is administered by the Federal Energy Regulatory Commission (FERC). The Clean Water Act is administered by the states.

Administrative regulations for hydropower projects have been adopted pursuant to the MWDCA by the Land Use Regulation Commission (LURC) and the Department of Environmental Protection (DEP). These regulations became effective on September 29, 1987.

The following is a summary of the laws and procedures involved in applying for a hydropower permit or water quality certification. This summary is intended only as an overview. For more specific information, please refer to the appropriate statutes and regulations.

II. Hydropower Permitting

A. What is a hydropower project?

A hydropower project is any development that utilizes the flow or other movement of water, including tidal or wave action, as a source of electrical or mechanical power, or that regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project development includes all powerhouses, dams, water conduits, turbines or other in-stream power devices, generators, transmission lines, water impoundments, roads, and other appurtenant works and structures that are part of the development. 38 M.R.S.A. Section 632(3).

B. When is a MWDCa permit required?

Pursuant to 38 M.R.S.A. Section 633, a MWDCa permit is required for:

1. The construction or reconstruction of a hydropower project, or the structural alteration of a hydropower project in ways which change water levels or flows above or below a dam; and
2. The maintenance and repair of an existing hydropower project involving any dredging or filling below the normal high-water line of a great pond, coastal wetland, river, stream or brook; or any dredging or filling on land adjacent to those waters such that any dredged spoil, fill or structure may fall or be washed into those waters. Refer to Section 4(B) of the regulations for examples of the types of projects requiring a permit.

C. When is a MWDCa permit not required?

Pursuant to 38 M.R.S.A. Section 633(3), a MWDCa permit is not required for normal maintenance and repair of an existing and operating hydropower project provided that no dredging or filling is involved. Refer to Section 4(C) of the hydropower regulations for examples of the type of projects not requiring a permit.

D. When is water quality certification required?

Pursuant to U.S Public Law 92-5200, Section 401 (as amended), known as the Clean Water Act, any applicant for a federal license or permit for an activity which may result in a discharge to navigable waters must obtain State certification that the activity will not violate applicable water quality standards. Water quality certification is considered in conjunction with every hydropower permit issued, and as a part of the federal licensing/relicensing process. Refer to Section 8(D) of the hydropower regulations for an explanation of the certification review and approval process.

E. Who administers these laws?

DEP reviews applications for MWDCa permits for hydropower projects located wholly or partly within an organized municipality or that use tidal action as a source of power, regardless of location. LURC reviews applications for non-tidal power projects located wholly within unorganized townships or plantations.

Pursuant to Executive Order of the Governor, LURC is the water quality certifying agency for activities located wholly within areas of its jurisdiction and subject to permitting by LURC. DEP is the water quality certifying agency for all activities statewide not subject to permitting by LURC, including the licensing and relicensing of existing hydropower projects.

III. Protection of Outstanding River Segments

The Maine Rivers Policy protects certain outstanding river segments from hydropower development, due to their unparalleled natural and recreational values. A total of 1,051 miles of eighteen rivers and streams have been protected, including segments of the Allagash River, the Aroostook River, the Dead River, the Dennys River, the East Machias River, the Fish River, the Kennebec River, the Machias River, the Mattawamkeag River, the Moose River, the Narraguagus River, the Penobscot River, the

Pleasant River, the Rapid River, the Saco River, the St. John River, the Sheepscot River, and the West Branch Pleasant River. 12 M.R.S.A. Section 403.

No permit may be issued by the DEP or LURC for the construction of a new dam on an outstanding river segment without the specific authorization of the Legislature. In addition, no permit may be issued for the additional development or redevelopment of an existing dam where the significant resource values of the river segment would be diminished. 12 M.R.S.A. Section 403.

Development of new hydroelectric dams on a segment of the upper St. Croix River is subject to special review, due to the special status of the river as an international boundary. 12 M.R.S.A. Section 405.

IV. Applications: Processing and Permitting

A. What is the application review process?

When an application is received, it is reviewed for completeness. If an application is incomplete, additional information may be requested from the applicant, or the application may be returned without processing. If the application is deemed complete, it is accepted for processing.

The application is circulated among various State agencies and the DEP's Division of Environmental Assessment. 38 M.R.S.A. Section 634(3). The agencies are asked to review and comment on the application. Municipal officials, abutting landowners, and members of the general public are also given an opportunity to comment on the application.

Effective June 2009, a special General Permit review process is available for tidal energy demonstration projects. See 38 M.R.S.A. Section 636-A.

Refer to Chapter 2 of the DEP Regulations or Chapter 4 of the LURC regulations for additional information on the processing of applications.

B. What decisions can be made?

An application may be approved, disapproved, or scheduled for hearing. Once a hearing is held, an application will be approved or disapproved. Any approval may be subject to conditions, including but not limited to the establishment of a water level range for the body of water impounded by the project; the establishment of instantaneous minimum flows for the body of water affected by the project; and provision for the construction and maintenance of fish passage facilities. 38 M.R.S.A. Section 635.

C. When will a MWDCA permit be issued?

A MWDCA permit will be issued when the following criteria have been met:

1. The applicant has the financial capability and technical ability to undertake the project;
2. The applicant has made adequate provisions for the protection of public safety;
3. The project will result in significant economic benefits to the public;

4. The applicant has made adequate provisions for traffic movement associated with the project;
5. The project is consistent with LURC zoning, where applicable;
6. The applicant has made reasonable provisions to realize the environmental benefits of the project and to mitigate its adverse environmental impacts;
7. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon specified environmental and energy considerations. These considerations include impacts on soil stability, wetlands, natural environment, fish and wildlife resources, historic and archeological resources, public access, flood control, and energy generation; and
8. There is a reasonable assurance that the project will not violate applicable state water quality standards. [Note: Please refer to the State's Water Classification Program (38 M.R.S.A. Sections 464-470) for a description of the applicable water quality standards and the classification of all waters of the State.]

38 M.R.S.A. Section 636.

V. **Who Do You Call?**

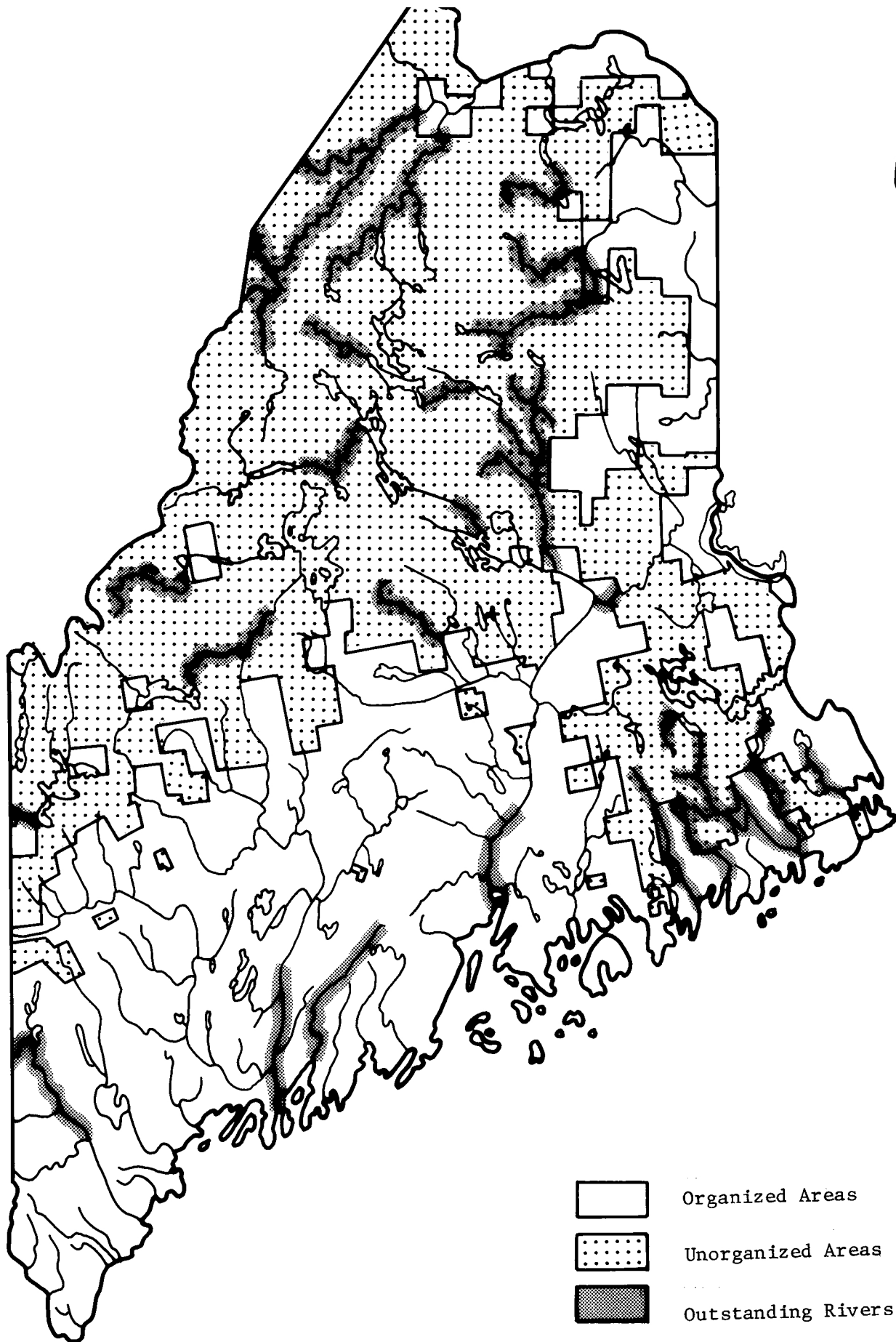
For additional information on hydropower development and permitting, contact one of the agencies listed below.

- **For any tidal power project and for a hydropower project in wholly or partly in an organized municipality(ies):**

Department of Environmental Protection
Bureau of Land & Water Quality
Division of Water Quality Management
17 State House Station
Augusta, Maine 04333-0017
(207) 287-7688 or toll free 800-452-1942

- **For a hydropower project wholly in an unorganized territory(ies):**

Land Use Regulation Commission
Division of Land Development Review
22 State House Station
Augusta, Maine 04333-0022
(207) 287-2631 or toll free 888-557-6690



MAINE REVISED STATUTES ANNOTATED

**TITLE 12
CONSERVATION**

**Part 1
SOIL AND WATER CONSERVATION**

**CHAPTER 200
MAINE'S RIVERS**

12 § 401. Maine's rivers

The Legislature finds:

1. Rivers and streams a natural resource. That the State's nearly 32,000 miles of rivers and streams comprise one of its most important natural resources, historically vital to the state's commerce and industry and to the quality of life enjoyed by Maine people;

2. Increase in value of rivers and streams. That the value of its rivers and streams has increased in recent years due to the improvement in the quality of their waters, the restoration of their fisheries, the growth in demand for hydropower and the expanding interest in river recreation activities, leading at times to conflict among these uses;

3. Use of rivers and streams. That its rivers and streams afford the state's people with major opportunities for the enjoyment of nature's beauty, unique recreational activities and solace from an industrialized society, as well as for economic expansion through the development of hydropower, the revitalization of waterfronts and ports and the attraction of both tourists and desirable new industries; and

4. Policy. That the best interests of the state's people are served by a policy which recognizes the importance that their rivers and streams have for meeting portions of several public needs, provides guidance for striking a balance among the various uses which affords the public maximum benefit and seeks harmony rather than conflict among these uses.

12 § 402. Declaration of policy

In its role as trustee of the public waters, the Legislature declares that the well-being of the citizens of this State depends on striking a carefully considered and well-reasoned balance among the competing uses of the state's rivers and streams. Further, the Legislature declares that such a balance shall:

1. Restoration of water. Restore waters to a condition clean enough to allow fishing and swimming in all our rivers and streams;

2. Revitalization of waterfronts. Revitalize waterfronts and ports;

3. Maintenance of scenic beauty. Maintain, even in areas where development occurs, the scenic beauty and character of our rivers;

- 4. Interest of riparian owners.** Recognize and respect the rightful interests of riparian owners;
- 5. Increase hydroelectric power.** Increase the hydroelectric power available to replace foreign oil in the State;
- 6. Hydropower development.** Streamline procedures to facilitate hydropower development under reasoned environmental, technical and public safety constraints;
- 7. Fisheries.** Restore anadromous fisheries and improve the productivity of inland fisheries;
- 8. Recreation.** Expand the opportunities for outdoor recreation; and
- 9. Outstanding river stretches.** Protect the special resource values of the flowing waters and shorelands of the States most outstanding river stretches, as identified by the Department of Conservation's 1982 Maine Rivers Study and as specifically delineated in this chapter.

Further, the Legislature finds that with careful planning our foreseeable needs for all of these uses may be reasonably integrated harmoniously with one another on the states 32,000 miles of rivers and streams.

12 § 403. Special protection for outstanding rivers

The Legislature declares that certain rivers, because of their unparalleled natural and recreational values, provide irreplaceable social and economic benefits to the people in their existing state. It is the Legislatures intent that no new dams be constructed on these river and stream segments without the specific authorization of the Legislature, that no new water diversion, which would constitute a hydropower project pursuant to Title 38, Section 632, and which would by-pass all or part of the natural course of these river and stream segments, be constructed without the specific authorization of the legislature, and that additional development or redevelopment of dams existing on these segments, as of September 23, 1983, shall be designed and executed in a manner that either enhances or does not diminish the significant resource values of these river segments identified by the 1982 Maine Rivers Study. No license or permit under Title 38, sections 630 to 636 may be issued for construction of new dams on the river and stream segments subject to this special protection without the specific authorization of the Legislature, for the construction of any water diversion project which would constitute a hydropower project pursuant to Title 38, Section 632, and which would by-pass all or part of the natural course of river and stream segments subject to this special protection without the specific authorization of the Legislature, or for additional development or redevelopment of existing dams on the river and stream segments subject to this special protection where the additional development or redevelopment diminishes the significant resource values of these river and stream segments.

Further, the Legislature finds that projects inconsistent with this policy on new dams and diversion projects, which constitute hydropower projects pursuant to Title 38, Section 632, and redevelopment of existing dams will alter the physical and chemical characteristics and designated uses of the waters of these river and stream segments. It finds that these impacts are unacceptable and constitute violations of the states water quality standards. The Legislature directs that no project which fails to meet the requirements of this section may be certified under the United States Clean Water Act, Section 401.

For purposes of this section, outstanding river and stream segments meriting special protection shall include:

1. Allagash River. The Allagash River from Gerald Brook in Allagash up to but not including the Churchill Dam in T.10, R.12, W.E.L.S., including its tributaries the Musquacook Stream from the Allagash River to the outlet of Third Musquacook Lake in T.11, R.11, W.E.L.S.; Allagash Stream from its inlet to Chamberlain Lake to the outlet of Allagash Pond in T.9, R.15, W.E.L.S.; and Chemquasabamticook Stream from its inlet into Long Lake to the outlet of Chem quasabamticook Lake, excluding Round Pond in T.13, R.12, W.E.L.S., Harvey Pond, Long Lake, Umsaskis Lake, Musquacook Lakes (1-2), Little Round Pond in T.8, R.13, W.E.L.S., Allagash Lake and Clayton Lake;

2. Aroostook River. The Aroostook River from and including the Sheridan Dam in Ashland to Millinocket Stream, including its tributaries Millinocket Stream from the Aroostook River to the outlet of Millinocket Lake; Munsungan Stream from the Aroostook River to the outlet of Little Munsungan Lake; St. Croix Stream from the Aroostook River to Hall Brook in T.9, R.5, W.E.L.S.; and the Big Machias River from the Aroostook River to the outlet of Big Machias Lake, excluding Round Pond in T.7, R.9, W.E.L.S.;

3. Dead River. The Dead River from the Kennebec River to the upstream limit of Big Eddy.

4. Dennys River. The Dennys River from Hinckley Point in Dennysville to the outlet of Meddybemps Lakes;

5. East Machias River. The East Machias River, including the Maine River, from the Route 191 Mill Memorial Bridge in East Machias to the outlet of Pocomoonshine Lake, excluding Hadley Lake, Second Lake, Round Lake, Crawford Lake, Lower Mud Lake and Upper Mud Lake;

6. Fish River. The Fish River from its inlet into St. Froid Lake in T.14, R.7, W.E.L.S. to the outlet of Mud Pond in T.13, R.8, W.E.L.S., excluding Portage Lake, Round Pond and Fish River Lake.

7. Kennebec River. The Kennebec River from Bay Point in Georgetown to its confluence with the Sebasticook River in Winslow and from the confluence of the Dead River with the Kennebec River up to, but not including, the Harris Dam in Indian Stream Township;

8. Machias River. The Machias River, including Fourth and Fifth Lake Streams, from Fort O'Brien in Machias to the outlet of Fifth Machias Lake, including its tributaries the West Branch Machias River from the Machias River to the outlet of Lower Sabago Lake; Old Stream from the Machias River to the outlet of First Lake; and Mopang Stream from the Machias River to the outlet of Mopang Second Lake, excluding Machias Lakes (1-4), Lower Pond and Mopang First Lake;

9. Mattawamkeag River. The Mattawamkeag River from the Penobscot River to the Mattawamkeag and Kingman Township townline.

10. Moose River. The Moose River from its inlet into Attean Pond to its confluence with Number One Brook in Beattie Township;

11. Narraguagus River. The Narraguagus River from the Route 1 bridge in Cherryfield to the outlet of Eagle Lake, excluding Beddington Lake and Deer Lake;

12. Penobscot River. The Penobscot River, including the Eastern Channel, from Sandy Point in Stockton Springs up to, but not including, the Veazie Dam, including its tributaries the West Branch of the Penobscot from its inlet into Ambajelus Lake to the western Boundary of T.3, R.10, and from its inlet into Chesuncook Lake up to, but not including, the dam at Seboomook Lake; the East Branch Penobscot River from the Penobscot River up to, but not including, the dam at the outlet of Grand Lake Matagamon; the Wassataquoik Stream from the East Branch of the Penobscot River to Annis Brook in T.4, R.9, W.E.L.S.; the Webster Brook from its inlet into Grand Lake Matagamon up to, but not including, Telos Dam in T.6, R.11, W.E.L.S.; the Seboeis River from the East Branch of the Penobscot River to the outlet of Snowshoe Lake; and the Sawtelle Brook from the Seboeis River up to, but not including, the dam at the outlet of Sawtelle Deadwater, excluding Passamagamet Lake, Webster Lake, White Horse Lake and Snowshoe Lake;

13. Pleasant River. The Pleasant River from Seavey Point in Addison to the outlet of Pleasant River Lake;

14. Rapid River. The Rapid River from the Magalloway Plantation and Upton townline to the outlet of Pond in the River;

15. Saco River. The Saco River from the Little Ossipee River to the New Hampshire border;

16. St. John River. The St. John River from one mile above the foot of Big Rapids in Allagash to the Baker Branch, including its tributaries the Big Black River from the St. John River to the Canadian border; the Northwest Branch from the St. John River to the outlet of Beaver Pond in T.12, R.17, W.E.L.S.; the Southwest Branch from the Baker Branch to 5 miles downstream of the Canadian border; and the Baker Branch from the St. John River to 1.5 miles below Baker Lake;

17. Sheepscot River. The Sheepscot River from the Route 1 bridge in Wiscasset to Halldale Road in Montville, excluding Long Pond and Sheepscot Pond, including its tributaries the West Branch of the Sheepscot from its confluence with the Sheepscot River in Whitefield to the outlet of Branch Pond in China; and

18. West Branch Pleasant River. The West Branch Pleasant River from the East Branch to the outlet of Fourth West Branch Pond in Shawtown Township, excluding Silver Lake and West Branch Ponds (1-3).

12 § 403-A. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Existing dam. "Existing dam" means any man-made barrier across a river segment identified in this chapter which impounds water and has not deteriorated or been breached or modified to the point where it no longer impounds water at 50% or more of its design level at normal flows.

12 § 404. Maine Guarantee Authority

The Maine Guarantee Authority may not finance any emergency generating system project under Title 10, Chapter 110, if that project is located in whole or in part on any river listed in section 403.

12 § 405-A. St. Croix River

1. Special consideration. In consideration of the special status of the St. Croix River as an international boundary governed in part by the International Joint Commission and the Province of New Brunswick, the Legislature establishes the following provisions.

2. Commercial, industrial or residential development. Except as provided in this subsection, no person may undertake any further commercial, industrial or residential development in the area within 250 feet of the St. Croix River from the Grand Falls flowage to the north end of Wingdam Island. The following activities shall be exempt from these provisions:

A. Development of hydroelectric or other dams, plants and related facilities or improvements subject to the conditions described in subsection 3;

B. A bridge at Vanceboro;

C. A haul road from Grand Falls;

D. Activities and developments related to timber harvesting, mining or extraction of sand and gravel; and

E. Any recreational management activity conducted or approved by the State.

3. New hydroelectric dams. No person may develop new hydroelectric dams on the St. Croix River from Grand Falls to the north end of Wingdam Island without first:

A. Having performed a feasibility study, by a qualified consultant approved by the Governor, to examine the alternative potentials for hydropower development downstream from Grand Falls and make the findings available to the State for review;

B. Having consulted with the office of the Governor or other agency of the State, designated by the Governor, regarding the feasibility of this downstream development; and

C. Having determined that there exists no economically feasible site downstream from Grand Falls; and

D. Having consulted with the St. Croix International Waterway Commission.

If the State disagrees with any of the assumptions, findings or conclusions of the economic feasibility study, the comments of the State shall be considered and responded to by the consultant. These comments and the responses of the consultant shall be noted in the final report of the economic feasibility study.

4. Review. The State Planning Office shall review the status of hydropower development on the St. Croix River and shall report to the joint standing committee of the Legislature having jurisdiction over energy and natural resources by January 1, 1993 and every 5 years thereafter. The report shall include any recommendations for changes in the provisions of this section together with the justification for the changes. If the St. Croix River is included in any legislative Act or regulation which directly or indirectly has as its effect the essential prohibition of construction of new dams or development or redevelopment of existing dams on the St. Croix River, this section shall be repealed on the effective date of that Act or regulation.

12 § 406. Report

The State Planning Office shall provide a report no later than December 1, 1986, to the Legislature detailing the status of policy accomplishments pursuant to this chapter

12 § 407. Comprehensive River Resource Management Plans

The State Planning Office, with assistance from the Department of Inland Fisheries and Wildlife, the Department of Marine Resources, the Department of Environmental Protection and other state agencies as needed, shall develop, subject to the Maine Administrative Procedures Act, Title 5, section 375, a comprehensive river resource management plan for each watershed with a hydropower project licensed under the Federal Power Act or to be licensed under the Federal Power Act. These plans shall provide a basis for state agency comments, recommendations and permitting decisions and shall at a minimum include, as applicable, minimum flows, impoundment level regimes, upstream and downstream fish passage, maintenance of aquatic habitat and habitat productivity, public access and recreational opportunities. These plans shall update, complement and, after public notice, comment, and hearings in the watershed, be adopted as components of the State's comprehensive rivers management plan.

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**TITLE 38
WATERS AND NAVIGATION**

**CHAPTER 5
GENERAL PROVISIONS RELATING TO RIVERS AND STREAMS**

**SUBCHAPTER 1
MILLS AND DAMS**

ARTICLE 1. ERECTION AND FLOWAGE RIGHTS

SUBARTICLE 1-B. PERMITS FOR HYDROPOWER PROJECTS

38 § 630. Short title

This subarticle may be cited and referred to in proceedings and agreements as the "Maine Waterway Development and Conservation Act."

38 § 631. Purposes

1. Findings. The Legislature finds and declares that the surface waters of the State constitute a valuable indigenous and renewable energy resource; and that hydropower development utilizing these waters is unique in its benefits and impacts to the natural environment, and makes a significant contribution to the general welfare of the citizens of the State for the following reasons.

A. Hydropower is the state's only economically feasible, large-scale energy resource which does not rely on combustion of a fuel, thereby avoiding air pollution, solid waste disposal problems and hazards to human health from emissions, wastes and by-products. Hydropower can be developed at many sites with minimal environmental impacts, especially at sites with existing dams or where current type turbines can be used.

B. Like all energy generating facilities, hydropower projects can have adverse effects; in contrast with other energy sources, they may also have positive environmental effects. For example, hydropower dams can control floods and augment downstream flow to improve fish and wildlife habitats, water quality and recreational opportunities.

C. Hydropower is presently the State's most significant indigenous resource that can be used to free our citizens from their extreme dependence on foreign oil for peaking power.

2. Policy and purpose. The Legislature declares that hydropower justifies singular treatment. The Legislature further declares that it is the policy of the State to support and encourage the development of hydropower projects by simplifying and clarifying requirements for permits, while assuring reasonable protection of natural resources and the public interest in use of waters of the State. It is the purpose of this subarticle to require a single application and permit for the construction of all hydropower projects and for the reconstruction of structural alteration of certain projects, including water storage projects. The permit application process shall be administered by the Department of Environmental Protection, except that, for hydropower projects within the jurisdiction of the Maine Land Use Regulation Commission, the commission shall administer the permit application process under this subarticle.

38 § 632. Definitions

As used in this subarticle, unless the context indicates otherwise, the following terms have the following meanings.

1. Board. "Board" means the Board of Environmental Protection, except that, for any hydropower project within the jurisdiction of the Maine Land Use Regulation Commission, "board" means the Maine Land Use Regulation Commission.

1-A. Commissioner. "Commissioner" means the Commissioner of Environmental Protection, except that, for any hydropower project within the jurisdiction of the Maine Land Use Regulation Commission, "commissioner" means the Director of the Maine Land Use Regulation Commission.

2. Department. "Department" means the Department of Environmental Protection, except that, for any hydropower project within the jurisdiction of the Maine Land Use Regulation Commission, "department" means the Maine Land Use Regulation Commission.

3. Hydropower project. "Hydropower project" means any development that utilizes the flow or other movement of water, including tidal or wave action, as a source of electrical or mechanical power or that regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project development includes all power houses, dams, water conduits, turbines or other in-stream power devices, generators, transmission lines, water impoundments, roads and other appurtenant works and structures that are part of the development.

38 § 633. Prohibition

1. Permit required. A person may not initiate construction or reconstruction of a hydropower project, or structurally alter a hydropower project in ways that change water levels or flows, without first obtaining a permit from the department.

2. Exceptions. This subarticle shall not apply to activities for which, prior to the effective date of this Act, a permit or permits have been issued pursuant to any of the following laws: Land use regulation laws, Title 12, sections 681 to 689; stream alteration laws, Title 12, sections 7776 to 7780; great ponds laws, sections 391 to 394; alteration of coastal wetlands laws, sections 471 to 478; site location of development laws, sections 481 to 490; and small hydroelectric generating facilities laws, sections 621 to 626.

3. Exemptions. Normal maintenance and repair of an existing and operating hydropower project shall be exempt from this subarticle, provided that:

A. The activity does not involve any dredging or filling below the normal high-water line of any great pond, coastal wetland, river, stream or brook; and

B. The activity does not involve any dredging or filling on the land adjacent to any great pond, coastal wetland, river, stream or brook such that any dredged spoil, fill or structure may fall or be washed into those waters.

38 § 634. Permit requirements

1. Coordinated permit review. Permits required under the following laws are not required by any state agency for projects reviewed or exempted from review under this subarticle: natural resources protection laws, chapter 3, subchapter I, article 5-A; site location of development laws, chapter 3, subchapter I, article 6; and land use regulation laws, Title 12, chapter 206-A. Notwithstanding section 654, the department may attach reasonable conditions consistent with this subarticle concerning the operation of hydropower projects. The commissioner shall give written notice to the Commissioner of Inland Fisheries and Wildlife and the Commissioner of Marine Resources of the intent of any applicant for a permit to construct a dam.

2. Application. An application for a permit required by section 633 must be made on forms provided by the commissioner and filed with the commissioner. Public notice of the filing must be made as required by the Board.

3. Application review. Within 10 working days of receiving a completed application, the commissioner shall notify the applicant of the official date on which the application was accepted.

The commissioner shall circulate the application among the Department of Environmental Protection, Department of Conservation, Department of Inland Fisheries and Wildlife, Department of Marine Resources, Department of Transportation, Maine Historic Preservation Commission, State Planning Office, Public Utilities Commission and the municipal officials of the municipality in which the project is located. The State Planning Office and the Public Utilities Commission shall submit written comments on section 636, subsection 7, paragraph F. For projects within the jurisdiction of the Maine Land Use Regulation Commission, the director may request and obtain technical assistance and recommendations from the staff of the department. The Commissioner of Environmental Protection shall respond to the requests in a timely manner. The recommendations of the Commissioner of Environmental Protection must be considered by the commission in acting upon a project application.

4. Dam removal. A person intending to file an application for a permit to remove an existing dam must attend a preapplication meeting with the department and must hold a public informational meeting prior to filing the application. The preapplication meeting and public informational meeting must be held in accordance with the department's rules on the processing of applications.

38 § 634-A. Administering Agency

1. Department. The department shall administer the permit process for a hydropower project that:

- A. Is located wholly or partly within an organized municipality; or
- B. Uses tidal action as a source of electrical or mechanical power, regardless of the hydropower project's location.

2. Maine Land Use Regulation Commission. The Maine land Use Regulation Commission shall administer the permit process for a hydropower project that is located wholly within the State's unorganized and deorganized area as defined by Title 12, section 682, subsection 1 and that does not use tidal action as a source of electrical or mechanical power.

38 § 635. Department decision

Upon receipt of a properly completed application, the department shall:

1. Approval. Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy. These terms and conditions may include, but are not limited to:

A. Establishment of a water level range for the body of water impounded by a hydropower project;

B. Establishment of instantaneous minimum flows for the body of water affected by a hydropower project; and

C. Provision for the construction and maintenance of fish passage facilities;

When the proposed project involves maintenance, reconstruction or structural alteration at an existing hydropower project and when the proposed project will not alter historic water levels or flows after its completion, the department may impose temporary terms and conditions of approval relating to paragraph A or paragraph B but may not impose permanent terms and conditions that alter historic water levels or flows;

2. Disapproval. Disapprove the proposed project, setting forth in writing the reasons for the disapproval; or

3. Hearing. Schedule a hearing on the proposed project. Any hearing held under this subsection must follow the notice requirements and procedures for an adjudicatory hearing under Title 5, chapter 375, subchapter IV. After a hearing is held under this subsection, the department shall make findings of facts and issue an order approving or disapproving the proposed project, as provided in subsections 1 and 2.

38 § 635-A. Time limits for processing applications

Whenever the commissioner receives a properly completed application, the department shall make a decision as expeditiously as possible.

When the proposed project lies within the jurisdiction of the Maine Land Use Regulation Commission, decisions shall be made within 105 working days except that decisions delegated to the director shall be made within 60 working days. Following one extension of up to 45 working days, the director may waive the time limit requirements of this section only at the request of the applicant.

38 § 635-B. Procedures for water quality certification

Issuance of a water quality certificate required under the United States Water Pollution Control Act, Section 401, is coordinated for the applicant under this subarticle by the Commissioner of Environmental Protection. The issuance of a water quality certificate is mandatory in every case where the department approves an application for a permit or general permit under this subarticle. An application for a tidal energy demonstration project under section 636-A that is accepted as complete by the department serves as an application for water quality certification for the proposed project pursuant to the Federal Water Pollution Control Act, Section 401, 33 United States Code, Section 1341. The

department shall issue or deny certification at the same time it approves or disapproves the proposed project. If issued, the certification must state that there is a reasonable assurance that the project will not violate applicable water quality standards. The coordination function of the department with respect to water quality certification does not include any proceedings or substantive criteria in addition to those otherwise required by this subarticle.

38 § 636. Approval criteria

The department shall approve a project when it finds that the applicant has demonstrated that the following criteria have been met.

1. Financial capability. The applicant has the financial capability and technical ability to undertake the project. In the event that the applicant is unable to demonstrate financial capability, the department may grant the permit contingent upon the applicant's demonstration of financial capability prior to commencement of the activities permitted.

2. Safety. The applicant has made adequate provisions for protection of public safety.

3. Public benefits. The project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for workers of the State.

4. Traffic movement. The applicant has made adequate provisions for traffic movement of all types out of or into the development area.

5. Maine Land Use Regulation Commission. Within the jurisdiction of the Maine Land Use Regulation Commission, the project is consistent with zoning adopted by the commission.

6. Environmental mitigation. The applicant has made reasonable provisions to realize the environmental benefits of the project, if any, and to mitigate its adverse environmental impacts.

7. Environmental and energy considerations. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the following considerations:

A. Whether the project will result in significant benefit or harm to soil stability, coastal and inland wetlands or the natural environment of any surface waters and their shorelands;

B. Whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the department shall consider other existing uses of the watershed and fisheries management plans adopted by the Department of Inland Fisheries and Wildlife, the Department of Marine Resources and the Atlantic Sea Run Salmon Commission;

C. Whether the project will result in significant benefit or harm to historic and archaeological resources;

D. Whether the project will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses;

E. Whether the project will result in significant flood control benefits or flood hazards; and

F. Whether the project will result in significant hydroelectric energy benefits, including the increase in generating capacity and annual energy output resulting from the project, and the amount of nonrenewable fuels it would replace.

The department shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this subsection, and a written explanation of their use of these findings in reaching their decision.

8. Water Quality. There is a reasonable assurance that the project will not violate applicable state water quality standards, including the provisions of section 464, subsection 4, paragraph F, as required for water quality certification under the United States Water Pollution Control Act, Section 401. This finding is required for both the proposed impoundment and any affected classified water bodies downstream of the proposed impoundment.

A. Notwithstanding section 464, subsection 2, the department shall reclassify the waters of the proposed impoundment to Class GPA if the department finds:

- (1) There is a reasonable likelihood that the proposed impoundment will thermally stratify;
- (2) The proposed impoundment will exceed 30 acres in surface area;
- (3) The proposed impoundment will not have any upstream direct discharges except cooling water; and
- (4) The proposed impoundment will not violate section 464, subsection 4, paragraph F.

38 § 636-A. General permit for tidal energy demonstration project

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. “Tidal energy demonstration project” or “project” means a hydropower project that uses tidal action as a source of electrical power and that:

- (1) Has a total installed generating capacity of 5 megawatts or less; and
- (2) Is proposed for the primary purpose of testing tidal energy generation technology, which may include a mooring or anchoring system and transmission line, and collecting and assessing information on the environmental and other effects of the technology.

2. General permit. A person may apply for a general permit for a tidal energy demonstration project in accordance with this section. If a general permit is granted pursuant to this section, an individual permit under section 633 is not required for the construction and operation of a tidal energy demonstration project.

3. Application requirements. An applicant for a general permit must file with the department an application that contains the following:

A. Written certification that the applicant has filed an application with the Federal Energy Regulatory Commission for a pilot project license for a proposed tidal energy demonstration project,

along with a copy of that application as filed with the commission. The application must contain such information as is required by the Federal Energy Regulatory Commission, including, but not limited to:

- (1) A description of the water of the State in which the proposed project will be located;
- (2) A description of proposed project facilities and operation;
- (3) Site-specific information regarding the physical environment in which the project is proposed to be located and the anticipated environmental effects of the proposed project;
- (4) A plan for monitoring the environmental effects of the project through the term of the general permit;
- (5) A plan for safeguarding the public and environmental resources through the term of the general permit;
- (6) A plan for removing the project after the termination of the general permit unless the applicant is pursuant a license for a commercial tidal power project at the site; and
- (7) Documentation that, in developing the application, the applicant has consulted with the appropriate local, state and federal resource agencies, as well as local governments, Indian tribes, nongovernmental organizations and members of the public likely to be interested in the project;

B. Documentation, including certificates of insurance, that the applicant has and will maintain a current general liability policy for the project that covers bodily injury, property damages and environmental damages in an amount considered reasonable by the department in consideration of the scope, scale and location of the project;

C. Documentation that the applicant has the financial and technical ability to construct and operated the project as proposed;

D. A copy of an environmental assessment issued by the Federal Energy Regulatory Commission for the proposed tidal energy demonstration project that includes a finding of “no significant environmental impact” pursuant to the National Environmental Policy Act of 1969, Public Law 91-190, 42 United States Code, Chapter 55; and

E. Written acknowledgement that, in accordance with this section, the department may require the applicant to take remedial action, at the applicant’s expense, pursuant to subsection 9, including but not limited to removal of the generating facilities and submerged utility line and termination of the project.

4. Notification. The department shall notify an applicant in writing within 60 days of its acceptance of the application for processing if the department determines that the requirements of this section have not been met. The notification must specifically cite the requirement of this section that have not been met. If the department has not notified the applicant under this subsection within the specified time period, a general permit is deemed to have been granted.

5. Fees. Except as otherwise provided by section 344-A, the department shall assess a fee for review of applications filed pursuant to this section as provided by section 352.

6. Violation. Any action taken by a person receiving a general permit under this section that is not in compliance with the plans submitted under subsection 3 or as subsequently modified with the approval of the department in consultation with agencies and other entities with whom the applicant has consulted in accordance with subsection 3, paragraph A, subparagraph (7) is a violation of the general permit.

7. General permit term. Except as otherwise provided in subsections 8 and 9, a general permit granted under this section is valid for the term of the pilot project license, including any related annual license, issued by the Federal Energy Regulatory Commission for the tidal energy demonstration project that is the subject of the general permit. The department may grant one or more extensions of the general permit term to coincide with any approved extension of the term of the pilot project license or any related annual license issued by the Federal Energy Regulatory Commission.

8. Surrender. A general permit granted pursuant to this section is deemed to have been surrendered and terminates on the date of approval by the Federal Energy Regulatory Commission of the surrender and termination of the pilot project license or any related annual license for the tidal energy demonstration project that is the subject of the general permit. An applicant may surrender to the department a general permit granted pursuant to this section prior to its expiration pursuant to subsection 7. Subject to conditions regarding project removal under subsection 10, the general permit terminates on the date of its surrender pursuant to this subsection.

9. Remedial action. If the department determines, based on the results of monitoring conducted by the applicant or other information, that there is substantial evidence that the project is having a significant adverse effect on a protected natural resources as defined by section 480-B, subsection 8, wildlife, including avian wildlife, bat species, marine mammals, fish or other marine resources or public health or safety, the department shall order the applicant to take action that the department considers necessary to address that adverse effect. Remedial action required by the department may include, but is not limited to:

A. Suspension or modification of project operations; or

B. Cessation of operations and removal of some or all elements of the project, including but not limited to the generating facilities, if there is no practicable alternative to address the adverse effect.

10. Project removal. Within 60 days of termination of the project pursuant to subsection 7 or 8, unless the applicant is pursuing a license for a commercial tidal power project at the site, and within 60 days of termination of the project pursuant to subsection 9, the applicant shall initiate implementation of the project removal plan provided for under subsection 4, paragraph A, subparagraph (6). If the applicant fails to begin implementing the plan within this 60-day period, the department may take such measures as it considers necessary to initiate and fully implement the plan by drawing on the financial surety provided pursuant to the project removal plan. The applicant's acceptance of the general permit constitutes agreement and consent by the applicant and its heirs, successors and assigns that the department may take such action as necessary to initiate and fully implement the project removal plan. The holder of the project removal funds shall release the project removal funds when the applicant has demonstrated and the department concurs that the project removal plan has been satisfactorily completed or upon written authorization by the department in the event the department implements the plans pursuant to this subsection.

11. Local review. A municipality may not enact or enforce any land use, zoning or other standard, conditions or requirement regarding a tidal energy demonstration project located within the municipality that is stricter than the standards, conditions or requirements of this section. The

municipality has the burden of proof regarding the location of the project in relation to its boundaries. Any action by the municipality regarding its authorization to site, construct or operate a tidal energy demonstration project must be taken within 60 days of the granting of a general permit under this section.

38 § 637. Review of rules

Rules adopted by the board pursuant to this subarticle shall be immediately submitted to the joint standing committee of the Legislature having jurisdiction over natural resources for review and may not become effective until 91 days after the adjournment of the next regular session of the Legislature which adjourns after their submission. This committee may report out legislation it deems necessary to clarify legislative intent regarding rules adopted pursuant to this subarticle.

SUBARTICLE 1-C. PUBLIC PARTICIPATION IN THE LICENSING AND RELICENSING OF HYDROELECTRIC DAMS

38 § 640. Public participation

Unless otherwise provided in accordance with regulations promulgated by the Federal Energy Regulatory Commission, for all existing hydropower projects located in Maine currently licensed under the Federal Power Act, and for all proposed hydropower projects requiring a license to operate under the Federal Power Act, all state agencies that review, comment on and consult in the proposed studies, plans, terms and conditions in the course of licensing or relicensing these projects, including the State Planning Office, the Department of Environmental Protection, the Department of Inland Fisheries and Wildlife and the Department of Marine Resources, shall cooperatively take the following steps to ensure that interested members of the public are informed of, and allowed to participate in, the review and comment process.

1. Publication. At the commencement of the consultation, review and comment process, the state agencies involved shall publish notification of this fact, informing the public of the issues anticipated to be involved in the licensing or relicensing process, the timetable for processing of the license and the opportunities the public has to comment on and participate in the process. The notice shall be designed to reach readership both statewide and in the vicinity of the hydropower project, including all persons that have contacted the agencies with an interest in this matter and all potentially interested persons.

2. Written notification of status. During the entire consultation process and including the filing of the license application under the Federal Power Act, the state agencies shall inform in writing all members of the public that have indicated an interest in the particular licensing process of the status of that process, including all requirements that the agencies may be placing upon the license applicant. That information shall be provided no less than once every 4 months.

3. Public comment. State agencies shall provide meaningful opportunities for public comment on the plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license.

4. Release of public information. All information submitted to the agencies by the applicants for a license under the Federal Power Act shall constitute a public record pursuant to Title 1, section 402, unless such information is otherwise exempted from public disclosure by state law. Release of this information to members of the public shall be governed by Title 1, section 408.

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**06-096 Chapter 450 &
04-061 Chapter 11: ADMINISTRATIVE REGULATIONS FOR HYDROPOWER PROJECTS**

SUMMARY: The Department of Environmental Protection and the Land Use Regulation Commission have adopted joint regulations for the processing of applications for hydropower projects under the Maine Waterway Development and Conservation Act and Maine Rivers Policy. The purpose of these regulations is to provide guidance on the administration of the Act, including guidance on how the Board and Commission will interpret the provisions of the Act and the Maine Rivers Policy and will approach the judgments they must make under the criteria set forth in the Act and the Policy.

- 1. Authority.** These regulations are promulgated pursuant to the Administrative Procedure Act, 5 M.R.S.A., Chapter 375; 12 M.R.S.A., Chapter 206-A; and 38 M.R.S.A., Sec. 343-A to interpret the Maine Rivers Policy, 12 M.R.S.A., Sec. 401-405 and the Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. 630-637.
- 2. Purpose.** In adopting the Maine Waterway Development and Conservation Act, the Legislature established "that it is the policy of the State to support and encourage the development of hydropower projects by simplifying and clarifying requirements for permits, while assuring reasonable protection of natural resources and the public interest in use of waters of the State".

The purpose of these regulations is to further this policy by providing guidance on the administration of the Act, including guidance on how the Board and Commission will interpret the provisions of the Act and the Maine Rivers Policy and will approach the judgments they must make under the criteria set forth in the Act and the Policy.

- 3. Definitions.** The following terms, as used in these regulations, shall have the following meanings, unless the context indicates otherwise:
 - A. Act.** "Act" means the Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. 630-637.
 - B. Board.** "Board" means the Board of Environmental Protection.
 - C. Commission.** "Commission" means the Land Use Regulation Commission of the Maine Department of Conservation.
 - D. Commissioner.** "Commissioner" means the Commissioner of the Department of Environmental Protection.
 - E. Department.** "Department" means the Department of Environmental Protection.
 - F. Director.** "Director" means the Director of the Land Use Regulation Commission.
 - G. Hydropower Project or Project.** "Hydropower project, or project," means any development which utilizes the flow of water as a source of electrical or mechanical power, or which regulates

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the flow of water for the purpose of generating electrical or mechanical power. A hydropower project development includes all powerhouses, dams, water conduits, transmission lines, water impoundments, roads and other appurtenant works and structures that are part of the development. (38 M.R.S.A., Sec. 632.3)

H. Mitigation. "Mitigation" means any action taken or not taken to avoid, minimize, rectify, reduce, eliminate, or compensate for actual or potential adverse environmental impacts. Such actions include, but are not limited to:

- (1) Avoiding an impact altogether by not taking a certain action or parts of an action;
- (2) Minimizing an impact by limiting the magnitude or duration of an activity or by controlling the timing of an activity;
- (3) Rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- (4) Reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; and
- (5) Compensating for an impact by replacing affected resources or environments or providing substitute resources or environments.

4. Permit Requirements

A. Prohibition. The Maine Waterway Development and Conservation Act (38 M.R.S.A., Sec. 633) states "No person may initiate construction or reconstruction of a hydropower project, or structurally alter a hydropower project in ways which change water levels or flows above or below the dam, without first obtaining a permit from the (Board or Commission). Normal maintenance and repair of an existing and operating hydropower project shall be exempt from (the requirement for a permit) provided that:

- (1) The activity does not involve any dredging or filling below the normal high-water line of any great pond, coastal wetland, river, stream or brook; and
- (2) The activity does not involve any dredging or filling on the land adjacent to any great pond, coastal wetland, river, stream or brook such that any dredged spoil, fill or structure may fall or be washed into those waters."

B. Activities Requiring a Permit. The following types of activities, by way of example, are subject to the requirement for a permit:

- (1) The construction of a new hydropower project, including a new water storage dam, or a new hydroelectric generating facility of any kind, whether utilizing a dam, a natural water feature, natural current velocities, or tidal action;
- (2) The reconstruction of a hydropower project;

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- (3) The structural alteration of a hydropower project in ways which change water levels or flows above or below the dam, including, but not limited to:
 - (a) The addition or alteration of flashboards; and
 - (b) The installation of additional or enlarged turbines; and
- (4) Any dredging or filling below the normal high-water line of a water body to facilitate maintenance and repair of an existing and operating hydropower project.

C. Activities Not Requiring a Permit. The following types of normal maintenance and repair activities at existing and operating hydropower projects, by way of example, are specifically exempt from the requirement for a permit, provided that the activity does not diminish water quality below applicable standards:

- (1) The resurfacing or repair of dams, canals, powerhouses, retaining walls, or other structures where no cofferdam, dredging, filling, or permanent water level alteration is involved;
- (2) The repair, removal or replacement of flashboards, stop logs, gates, or intake racks where no cofferdam, dredging, filling, or permanent water level alteration is involved;
- (3) Removal of materials collected on trash racks;
- (4) Removal of debris and other accumulated materials where no significant disturbance of soils or lake or river bottom materials is involved;
- (5) Installing or removing booms;
- (6) Placement and removal of non-earthen cofferdams temporarily installed immediately adjacent to an existing structure for the purpose of inspecting or repairing the structure;
- (7) Removal of sediment and debris from gated canals, tunnels and penstocks from which the water has been removed; and
- (8) Sealing of leaks in gates, stop logs and flashboards.

D. Jurisdiction. The Board or Commission acquires jurisdiction under the Maine Waterway Development and Conservation Act when a person either files an application to construct, reconstruct, or structurally alter a hydropower project, or initiates the unapproved construction, reconstruction, or structural alteration of a hydropower project, as defined by 38 M.R.S.A., Sec. 632.3 and Sec. 633 and these regulations.

5. Standard of Review

A. Maine Waterway Development and Conservation Act. The Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. 636, states that the Board or Commission shall approve a project when it finds that the applicant has demonstrated that seven criteria have been met. The criteria are as follows:

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- (1) Financial capability. The applicant has the financial capability and technical ability to undertake the project. In the event that the applicant is unable to demonstrate financial capability, the (Board or Commission) may grant the permit contingent upon the applicant's demonstration of financial capability prior to commencement of activities permitted. (38 M.R.S.A., Sec. 636.1)
- (2) Safety. The applicant has made adequate provisions for protection of public safety. (38 M.R.S.A., Sec. 636.2)
- (3) Public benefits. The project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for workers of the State. (38 M.R.S.A., Sec. 636.3)

To meet this criterion, the applicant must demonstrate that the benefits claimed from the proposed project are real, in that these benefits would not result but for the project. Further, the applicant must demonstrate that the project's economic benefits are greater than its economic costs, and that the resulting net benefit is significant.

"Benefit" is a term which requires a comparison between at least two conditions. Further, this section of the law calls for the Board and Commission to judge if the benefits are 'significant'. This too is a comparative term which can only be reasonably evaluated in light of other courses of action which might reasonably be pursued. Therefore, in order to accurately evaluate the existence and extent of the economic benefits that may result from a proposed hydropower project, it is necessary to compare two alternative futures: the economic conditions likely to exist if the project is built versus those likely to exist without the project.

NOTE: Experience has shown that the vast majority of projects have resulted in significant public economic benefits. This is because these relatively small projects at existing dams have lacked any substantial public economic costs, and the most likely alternative has been continued oil fired generation. However, a small number of projects have required a more thorough analysis of what was likely to happen if these projects were not built. Experience has also shown that these have been new dams which would have resulted in substantial public economic costs.

In cases involving new dams which would result in substantial economic costs, the consideration of alternatives is not limited to continued oil-fired generation; therefore, a demonstration that this criterion has been met must include comparing the benefits claimed from the project against the economic conditions that would otherwise result from any alternative source(s) of energy generation or conservation that might reasonably be pursued in the event that the project is not built.

Economic benefits and costs will be identified and measured using generally accepted methods and procedures, such as those published by the United States Water Resources Council. In accordance with these methods and procedures, economic benefits may include, but are not limited to, increases in the income or purchasing power of Maine citizens, energy

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security from reducing dependence upon fossil fuels, and creation of employment opportunities for workers of the State.

Similarly, in accordance with these methods and procedures, economic costs may include, but are not limited to, decreases in the income or purchasing power of Maine citizens, the value of other hydroelectric generating opportunities diminished or eliminated by a project, and the elimination of employment opportunities for workers of the State.

- (4) Traffic movement. The applicant has made adequate provision for traffic movement of all types out of or into the development area. (38 M.R.S.A., Sec. 636.4)
- (5) Maine Land Use Regulation Commission. Within the jurisdiction of the Maine Land Use Regulation Commission, the project is consistent with zoning adopted by the commission. (38 M.R.S.A., Sec. 636.5)

A proposal is consistent with such zoning if the proposed hydropower project, or portions of that project, as occur within the Commission's jurisdiction, are not prohibited uses under the zoning designation and standards in effect at the time of consideration as set forth in Chapter 10 of the Commission's Rules and Regulations.

In those instances where the project, or portions of that project, are prohibited uses under the zoning designation and standards in effect at the time of consideration, the applicant must file and obtain favorable action from the Commission on a rezoning petition or must amend the project to avoid conflicts with the Commission's zoning in order to satisfy this criterion.

- (6) Environmental mitigation. The applicant has made reasonable provisions to realize the environmental benefits of the project, if any, and to mitigate its adverse environmental impacts. (38 M.R.S.A., Sec. 636.6)

Mitigation is not necessarily limited to the replacement of affected resources or environments (i.e., in-kind or on-site mitigation) but may involve the provision of substitute resources or environments (i.e., out-of-kind or off-site mitigation). In-kind or on-site mitigation measures will be preferred. Off-site or out-of-kind measures may be acceptable where in-kind or on-site measures are demonstrated not to be feasible or desirable.

Whether an applicant's provisions to realize environmental benefits or to mitigate adverse environmental impacts are reasonable depends in part upon the significance of the resource(s) affected.

- (7) Environmental and energy considerations. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the following considerations:

NOTE: Significant cumulative adverse impacts are harms to the environment which add to the impacts of other existing facilities or uses such that a threshold of acceptability for the total impact is exceeded. For example, when viewed in isolation, a particular project might be seen as having only a minor on-site impact on water quality, e.g., a slight reduction in dissolved oxygen or a slight reduction in a run of anadromous fish.

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However, even minor reductions in dissolved oxygen at the site to levels well above the minimum acceptable standard might cause downstream areas affected by other existing projects or discharges to violate water quality standards. Likewise, a seemingly small reduction in the number of salmon (say 10 percent loss at the project in question) might, when combined with the effects of other existing dams, cause a run to fail because the number of fish needed to sustain a breeding population was not maintained.

- (a) Whether the project will result in significant benefit or harm to soil stability, coastal and inland wetlands or the natural environment of any surface waters and their shorelands;
- (b) Whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the (Board or Commission) shall consider other existing uses of the watershed and fisheries management plans adopted by the Department of Inland Fisheries and Wildlife, the Department of Marine Resources, and the Atlantic Sea Run Salmon Commission;
- (c) Whether the project will result in significant benefit or harm to historic and archaeological resources;
- (d) Whether the project will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses;
- (e) Whether the project will result in significant flood control benefits or flood hazards; and
- (f) Whether the project will result in significant hydroelectric energy benefits, including the increase in generating capacity and annual energy output resulting from the project, and the amount of nonrenewable fuels it would replace.
- (g) For an application filed after July 16, 1986, whether there is reasonable assurance that the project will not violate applicable water quality standards, as required for water quality certification under the United States Water Pollution Control Act, Section 401.

The (Board or Commission) shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this (criterion), and a written explanation of their use of these findings in reaching their decision. (38 M.R.S.A., Sec. 636.7)

The benefits of a project need not be greater than its harms for each of the specified environmental and energy considerations in order for this overall criterion to be satisfied. Therefore, this criterion has been met if, in the Board's or Commission's judgment, the applicant has demonstrated that the weight of the advantages of the project is greater than the weight of the direct and cumulative adverse impacts over the life of the project based upon the specified environmental and energy considerations.

Determining whether the advantages of the project are greater than its adverse impacts requires attaching value or weight to the project's various benefits and harms.

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NOTE: Experience has shown that this weighing has not been difficult for the vast majority of projects as no substantial adverse environmental impacts would have occurred to be balanced against the energy benefits of these projects. However, a small number of projects have required a more thorough analysis. Experience has also shown that these have been new dams with substantial adverse impacts.

In cases involving new dams which would result in substantial adverse impacts, the consideration of alternatives is not limited to continued oil-fired generation; therefore, a demonstration that this criterion has been met must include a description of the environmental and energy benefits and harms of the proposed project in comparison with the benefits and harms that would result from any alternative source(s) of energy generation or conservation that might reasonably be pursued in the event that the project is not built.

- B. The Maine Rivers Policy: Special Protection for Outstanding River Segments.** 12 M.R.S.A., Sec. 403, declares that certain river and stream segments, designated as outstanding rivers, are to be accorded special protection, by virtue of their unparalleled natural and recreational values. This special protection takes the following form:

"No license or permit under Title 38, Sections 630 to 636, may be issued for the construction of new dams on the river and stream segments subject to this special protection without the specific authorization of the Legislature, or for additional development or redevelopment of existing dams on the river or stream segments subject to this special protection where the additional development or redevelopment diminishes the significant resource values of these river and stream segments."

The outstanding river segments are identified in 12 M.R.S.A., Sec. 403. The significant resource values of the special protection rivers are those identified by the 1982 Maine Rivers Study, as provided in 12 M.R.S.A., Sec. 403.

Based on this special protection, the Board or Commission can only approve a permit pursuant to the Act for a new dam on an outstanding river segment where (1) the Legislature specifically authorizes the Board or Commission to consider such a permit and (2) the Board or Commission then finds that the project meets the criteria of 38 M.R.S.A., Sec. 636, as outlined in subsection A above.

Similarly, the Board or Commission can only approve a permit pursuant to the Act for the additional development or redevelopment of an existing dam on an outstanding river segment where (1) the Board or Commission finds that the project does not diminish the significant resource values of the outstanding river segment, and (2) the Board or Commission further finds that the project meets the criteria of 38 M.R.S.A., Sec. 636, as outlined in subsection A above.

In determining whether or not significant resource values identified by the Maine Rivers Study will be diminished, the Board or Commission will not consider measures proposed to replace or substitute for losses.

For the purposes of 12 M.R.S.A., Sec. 403, "existing dams on the river or stream segments subject to special protection" shall mean man-made barriers across the outstanding river segments identified in 12 M.R.S.A., Sec. 403, which impound water and which, as of June 17, 1983, had

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not been breached, deteriorated, or modified to the point where they no longer impounded water at or near their design level at normal flows.

For the purposes of 12 M.R.S.A., Sec. 403, "additional development or redevelopment of existing dams on a river or stream segment subject to special protection" shall mean any activities associated with the installation, reinstallation or expansion of hydroelectric or hydromechanical generating capacity at existing dams, as defined above, that do not result in any increase in water levels above these dams or any dewatering of river segments below these dams except during construction.

Dams located at the outlet of lakes or ponds specifically identified in 12 M.R.S.A., Sec. 403 shall not be considered to be on the outstanding river segments.

6. Administering Agency.

[REVISOR'S NOTE: The provisions of this subsection have been superseded by P.L. 2009 Chapter 270, which enacted 38 M.R.S.A. Sec. 634-A.]

The Act shall be administered by the Land Use Regulation Commission within its jurisdiction, including the unorganized townships, plantations and certain organized towns, and by the Board of Environmental Protection elsewhere in the State.

In the event a proposed project and areas directly affected by the project overlap the jurisdictions of the Board and Commission, permitting jurisdiction pursuant to the Act shall be determined as follows:

- A. Where the proposed construction, reconstruction, or structural alteration activities occur solely within one agency's jurisdiction, that agency shall be the permitting agency.
- B. Where the proposed construction, reconstruction, or structural alteration activities occur within the jurisdictions of both agencies, or where water is diverted in one jurisdiction and other project facilities are located in the other jurisdiction, a case-by-case determination shall be made by the two agencies as to which will administer the permitting process.

Where a proposed project and areas directly affected by the project overlap the State's boundaries, to the extent possible, a joint review of the project will be conducted by the Board or Commission and the agency having similar jurisdiction within the other state or Canadian Province.

- 7. Information Requirements.** To receive a permit, every applicant must demonstrate that the criteria of 38 M.R.S.A., Sec. 636 have been met. In all cases, such information shall be required as is deemed necessary by the Board, Commission or their staffs to describe the proposed project and its impacts in sufficient detail to enable the Board, Commission or their staffs to make an informed judgment on a particular project.

Where information required by the Board, Commission, or their staffs is contained in an Application for License or Exemption or an Application for Amendment of License or Exemption for a hydropower project that has been or is being filed with the Federal Energy Regulatory Commission (FERC), that information may be submitted as complete or partial fulfillment of these information requirements.

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Because of the differing nature of every project proposed for approval, an applicant is advised to consult with staff of the Commission or Department (whichever is applicable) prior to submitting an application.

8. Process and Time Limits for Decisions

A. Commissioner or Director Action. For those applications delegated* to the Commissioner of the Department of Environmental Protection or the Director of the Land Use Regulation Commission, the Commissioner or Director shall make a decision as expeditiously as possible, and shall within 60 working days of receipt of a properly completed application, either:

- (1) Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy; (38 M.R.S.A., Sec. 635); or
- (2) Disapprove the proposed project, setting forth in writing the reasons for the disapproval; (38 M.R.S.A., Sec. 635); or
- (3) Refer the proposed project to the Board or Commission, as appropriate, in which case the Board's or Commission's decision shall be reached within 105 working days of the agency's receipt of the completed application.

NOTE: Delegation of authority to the Commissioner of the Department of Environmental Protection to make decisions pursuant to the Act is provided for in Chapter I of the Department's Regulations. Delegation of authority to the Director of the Land Use Regulation Commission to make certain decisions pursuant to the Act is provided for by Commission action.]

B. Board or Commission Action. Upon receipt of a properly completed application, the Board or Commission shall either:

- (1) Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy;
- (2) Disapprove the proposed project, setting forth in writing the reasons for the disapproval; or
- (3) Schedule a hearing on the proposed project. Any hearing held under this subsection shall follow the notice requirements and procedures for an adjudicatory hearing under Title 5, Chapter 375, subchapter IV. After any hearing is held under this subsection, the Board (or Commission) shall make findings of facts and issue an order approving or disapproving the proposed project, as provided in subsections 1 and 2. (38 M.R.S.A., Sec. 635.)

The Board or Commission shall make its decision as expeditiously as possible but in no case will the decision be later than 105 working days after acceptance of the application, except as provided in subsection C.

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- C. Waiver of Time Limits.** The Act provides that, following one extension of up to 45 working days, the time limit requirement for decisions may be waived by the Commissioner or Director only at the request of the applicant.

D. Action on Water Quality Certification

[REVISOR'S NOTE: The provisions of this sub-section have been superceded by P.L. 1989 Chapter 309, which revised 38 M.R.S.A. Sec. 634.1, repealed 38 M.R.S.A. Sec. 363-C, and enacted 38 M.R.S.A. Sec. 635-B.]

As provided by 38 M.R.S.A., Sec. 634.1, the issuance of a water quality certificate, as required under the United States Water Pollution Control Act, Sec. 401, shall be mandatory in every case where the Board or Commission approves an application for a hydropower project permit under the Act, except in those cases where the Board or Commission has found that the applicant has not demonstrated that the project will not result in significant harm to water quality or will not violate applicable water quality standards.

The Commissioner or Director, as appropriate, shall act to issue or deny water quality certification within 5 working days following the decision by the Board or Commission to approve or disapprove a proposed project pursuant to 38 M.R.S.A., Sec. 636. Such action shall be based solely on the finding of the Board or Commission pursuant to 38 M.R.S.A., Sec. 636.7(G), as to whether there is a reasonable assurance that the project will not violate applicable water quality standards.

As provided by 38 M.R.S.A., Sec. 363-C, the waters of a new or proposed hydroelectric impoundment shall be deemed to be Class GP-A, if the Commissioner finds that it is reasonably likely that the impoundment would : (1) thermally stratify; (2) exceed 30 acres in surface area; and (3) not have any upstream direct discharges except cooling water. The Commissioner shall notify the Board or Commission, as appropriate, of any classification determination made pursuant to this statutory provision as soon as sufficient information is available to make such a determination.

9. Terms and Conditions of Approval

- A. Authority.** The Act provides that the Board or Commission may approve "the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy. These terms and conditions may include, but are not limited to:

- (A) Establishment of a water level range for the body of water impounded by a hydropower project;
- (B) Establishment of instantaneous minimum flows for the body of water affected by a hydropower project; and
- (C) Provisions for the construction and maintenance of fish passage facilities.

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In those cases where the proposed project involves maintenance, reconstruction or structural alteration at an existing hydropower project and where the proposed project will not alter historic water levels or flows after its completion, the (Board or Commission) may impose temporary terms and conditions of approval relating to paragraph A or paragraph B but shall not impose permanent terms and conditions that alter historic water levels or flows. (38 M.R.S.A., Sec. 635.1)

- B. Nature of Terms and Conditions.** Such case-specific terms and conditions as may be placed by the Board or Commission on its approval of a proposed project shall specify particular means of satisfying minor or easily corrected problems, or both, relating to compliance with the Act and shall not substitute for or reduce the burden of proof of the applicant to demonstrate to the Board or Commission that each of the standards of the Act has been met.
- C. Standard Conditions of Approval.** Unless otherwise specifically stated in the approval, all Board, Commissioner, Commission, and Director approvals shall be subject to the following standard conditions:
- (1) **Limits of Approval.** This approval is limited to and includes the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. All variances from the plans and proposals contained in said documents are subject to the review and approval of the Board or Commission prior to implementation.
 - (2) **Noncompliance.** Should the project be found, at any time, not to be in compliance with any of the conditions of this approval, or should the permittee construct or operate this project in any way other than specified in the application or supporting documents, as modified by the conditions of this approval, then the terms of this approval shall be considered to have been violated.
 - (3) **Compliance with all Applicable Laws.** The permittee shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation.
 - (4) **Inspection and Compliance.** Authorized representatives of the Board, Commission or the Attorney General shall be granted access to the premises of the permittee at any reasonable time for the purpose of inspecting the construction or operation of the project and assuring compliance by the permittee with the conditions of this approval.
 - (5) **Initiation and Completion of Construction.** If construction is not commenced within 3 years and completed within 7 years from the date of issuance of this permit, this approval shall lapse, unless a request for an extension of these deadlines has been approved by the Board or Commission.
 - (6) **Construction Schedule.** Prior to construction, the permittee shall submit a final construction schedule for the project to the Commissioner or Director.
 - (7) **Approval Included in Contract Bids.** A copy of this approval must be included in or attached to contract bid specifications for the project.

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- (8) Approval Shown to Contractor. Work done by a contractor pursuant to this approval shall not begin before a copy of this approval has been shown to the contractor by the permittee.
- (9) Notification of Project Operation. The permittee shall notify the Commissioner or Director of the commencement of commercial operation of the project within 10 days prior to such commencement.
- (10) Assignment or Transfer of Approval. This approval shall expire upon the assignment or transfer of the property covered by this approval unless written consent to transfer this approval is obtained from the Board or Commission. To obtain approval of transfer, the permittee shall notify the Board or Commission 30 days prior to assignment or transfer of property which is subject to this approval. Pending Board or Commission determination on the application for a transfer or assignment of ownership of this approval, the person(s) to whom such property is assigned or transferred shall abide by all of the terms and conditions of this approval. To obtain the Board's or Commission's approval of transfer, the proposed assignee or transferee must demonstrate the financial capability and technical ability to (1) comply with all terms and conditions of this approval and (2) satisfy all other applicable statutory criteria.

A "transfer" is defined as the sale or lease of property which is the subject of this approval, or the sale of 50 percent or more of the stock of or interest in a corporation or a change in a general partner of a partnership which owns the property subject to this approval.

10. Access to the Site. The filing of an application for approval of a development pursuant to 38 M.R.S.A., Sec. 633, constitutes the granting of permission by the applicant to allow Board or Commission members and their staffs, and others authorized by the Board or Commission access to the site of the proposed development in order to facilitate review of such application.

11. Severability. The provisions of this Chapter are severable. If a section, sentence, clause, or phrase of this Chapter is adjudged by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this Chapter.

AUTHORITY: 5 M.R.S.A., Chapter 375
12 M.R.S.A., Chapters 200 and 206-A
38 M.R.S.A., Sec. 343-A and Sec. 630-637

EFFECTIVE DATE: September 28, 1987

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 4, 1996

CORRECTION: January 13, 2000 - removed Section 5(A)(8) as never formally adopted;
restored 5(A)(7)(g) from original paper adoption.

SUMMARY OF LEGISLATIVE HISTORY

- P.L. 1983, Chapter 458 An Act to Promote the Wise Use and Management of Maine's Outstanding River Resources: repealed the law providing for licensing of small hydroelectric generating facilities (38 MRSA §§621-626); enacted the Maine Rivers Policy (12 MRSA §§ 401-406) and the Maine Waterway Development and Conservation Act (MWDCA) (38 MRSA §§ 630-636). [Effective date: September 23, 1983]
- P.L. 1983, Chapter 530 An Act to Make Additional Corrections of Errors and Inconsistencies in the Laws of Maine: amended 12 MRSA § 403 to correct several errors and inconsistencies. [Effective date: September 23, 1983]
- P.L. 1983, Chapter 779 An Act to Standardize Time Periods for the Processing of Applications: amended 38 MRSA § 635 to delete the original time limits for action on an application; enacted 38 MRSA § 635-A to establish new time limits for processing applications under the MWDCA. [Effective date: July 25, 1984]
- P.L. 1985, Chapter 362 An Act Concerning Extension of the Permit Processing Period for Hydropower Projects: amended 38 MRSA § 635-A to enable DEP or LURC to unilaterally extend the processing time limit on an application under the MWDCA by up to 45 working days. [Effective date: September 19, 1985]
- P.L. 1985, Chapter 698 An Act to Amend the Classification System for Maine Waters and Change the Classifications of Certain Waters: enacted 38 MRSA § 637 to require legislative review prior to the effective date of any regulations adopted by DEP and LURC pursuant to the MEDCA. [Effective date: July 16, 1986]
- P.L. 1985, Chapter 772 An Act to Clarify the Application of Water Quality Standards to Hydroelectric Projects: amended 38 MRSA § 634(1) to clarify the conditions under which water quality certification would be issued or denied for a project approved under the MWDCA; enacted 38 MRSA § 636(7)(G) to clarify the consideration of water quality impacts under the review criteria of the MWDCA. [Effective date: July 16, 1986]
- P.L. 1987, Chapter 635 An Act Relating to Development Along the St. Croix River: enacted 12 MRSA § 405-A to re-establish special consideration of the St. Croix River under the Maine Rivers Policy. (Note: through a sunset provision, 38 MRSA § 405 was repealed on January 1, 1988.) [Effective date: July 22, 1988]

- P.L. 1987, Chapter 717 An Act to Protect Maine's Outstanding Rivers from Water Diversion Projects: amended 12 MRSA § 403 to prohibit water diversion hydropower projects which would bypass the natural course of any outstanding river segment; enacted 12 MRSA § 403-A to define the term "existing dam" as used in the Maine River's Policy. [Effective date: April 14, 1988]
- P.L. 1989, Chapter 309 An Act to Conform Maine Water Quality Law with Federal Requirements: amended § 634(1) to update statutory cross-references and to delete paragraph on water quality certification; enacted 38 MRSA § 635-B to clarify procedures for issuance of water quality certification for hydropower projects; repealed 38 MRSA § 636(7)(G) and enacted 38 MRSA § 636(8) to make compliance with applicable water quality standards a mandatory criterion for permit approval under the MWDCA. [Effective date: September 30, 1989]
- P.L. 1989, Chapter 453 An Act to Ensure Notification and Participation by the Public in Licensing and Relicensing of Hydroelectric Dams and to Further Ensure the Equal Consideration of Fisheries and Recreational Uses in Licensing and Relicensing: enacted 12 MRSA § 407 to require the development of a comprehensive river resource management plan for each watershed with a hydropower project subject to federal licensing; enacted 38 MRSA § 640 to provide for public participation in the hydropower licensing and relicensing process. [Effective date: September 30, 1989]
- P.L. 1989, Chapter 501 An Act to Make Supplemental Appropriations and Allocations for the Expenditures of State Government...for the Fiscal Years Ending June 30, 1990, and June 30, 1991: amended 38 MRSA § 634(3) to substitute the State Planning Office for the Office of Energy Resources in the application review process. [Effective date: June 30, 1989]
- P.L. 1989, Chapter 890 An Act to Clarify the Role of the Board of Environmental Protection: amended 38 MRSA §§ 632-636 to delegate all hydropower project permitting decisions to the Commissioner of Environmental Protection and to delete specific time limits for the processing of applications under the MWDCA. [Effective date: July 14, 1990]
- P.L. 2003, Chapter 134 An Act to Require Public Meetings Prior to Dam Removal: enacted 38 MRSA § 634(4) to require a preapplication meeting and public informational meeting prior to filing of an

application to remove an existing dam. [Effective date: September 13, 2003]

- P.L. 2007, Chapter 160 An Act Regarding Energy-generating Facilities: amended 38 MRSA §§ 632-633 to require a permit for the construction, reconstruction or structural alteration of a project utilizing tidal or wave action to generate power. [Effective date: September 20, 2007]
- P.L. 2007, Chapter 364 An Act To Protect the Scenic Value of the Kennebec River: amended 12 MRSA § 403(7) to extend the upstream boundary of the outstanding rivers segment of the lower Kennebec River from the Father Curran Bridge in Augusta to its confluence with the Sebasticook River in Winslow. [Effective date: June 20, 2007]
- P.L. 2009, Chapter 270 An Act To Facilitate Testing and Demonstration of Renewable Ocean Energy Technology: enacted 38 MRSA § 634-A to provide that DEP would have permitting jurisdiction over all hydropower projects located wholly or partly within an organized municipality and over all hydropower projects using tidal action regardless of location; amended 38 MRSA § 635-B to address procedures for water quality certification for tidal energy demonstration projects; and enacted 38 MRSA § 636-A to establish a general permit process for tidal energy demonstration projects.

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